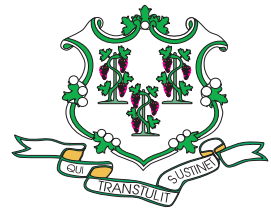




DEPARTMENT OF ADMINISTRATIVE SERVICES



STATE OF CONNECTICUT

GENERAL LETTER No. 214-D  
Revised October 12, 1995

TO: HEADS OF ALL STATE AGENCIES

SUBJECT: POLITICAL ACTIVITY

DATE: October 13, 1995

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ALAN J. MAZZOLA  
Deputy Commissioner

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The statutes, regulations and policies concerning political activity of employees in the classified service have been consolidated in this General Letter to provide some answers to questions on this subject. Please make sure that all classified employees in your agency are made aware of this information.

**Section 5-266a. Political Activities of Classified State Employees and judicial Department Employees.** (a) No person employed in the classified state service or in the Judicial Department may (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office; (2) directly or indirectly coerce, attempt to coerce, command or advise a state or local officer or employee to pay, lend, or contribute anything of value to a party committee organization agency or person for political purpose. (b) A person employed in said classified service or Judicial Department retains the right to vote as he chooses and to express his opinions on political subjects and candidates and shall be free to participate actively in political management and campaigns. Such activity may include but shall not be limited to membership and holding of office in a political party, organization or club, campaigning for a candidate in a partisan election by making speeches, writing on behalf of the candidate or soliciting votes in support of or in opposition to a candidate and making contributions of time and money to political parties, committees or other agencies engaged in political action except that no such employee shall engage in such activity while on duty or within any period of time during which such employee is expected to perform services for which he receives compensation from the state, and no such employee shall utilize state funds, supplies, vehicles, or facilities to secure support for or oppose any candidate, party or issue in a political partisan election. Notwithstanding the provisions of this subsection, any person employed in the classified state service or in the Judicial Department may be a candidate for a state or municipal office, in any political partisan election. No person seeking or holding municipal office or seeking state office in accordance with the provisions of this subsection shall engage in political activity or in the performance of the duties of such office while on state duty or within any period of time during which such person is expected to perform services for which such person receives compensation from the state. The State Ethics Commission shall establish by regulation definitions of conflict of interest which shall preclude persons in the classified state service or in the Judicial Department from holding elective office. (c) Any person employed in the classified state service or in the Judicial Department who leaves such service to accept a full-time elective municipal office shall be granted a personal leave of absence without pay from his state employment for not more than two consecutive terms of such office or for a period of four years, whichever is shorter. Upon reapplication for his original position at the expiration of such term or terms of office, such person shall be reinstated in his most recent state position or a similar position with equivalent pay or to a vacancy in any other position such person is qualified to fill. If no such positions are available, such person's name shall be placed on all reemployment lists for classes in which he has attained permanent status. Any person employed in the classified state service or in the Judicial Department who accepts an elective state office shall resign from such employment upon taking such office. In either event, such person shall give notice in writing to his appointing authority that he is a candidate for a state elective office or a full-time elective municipal office within thirty days (30) after nomination for that office.

**Section 5-266b. Permitted activity.** Nothing contained in sections 5-266a to 5-266d, inclusive, prohibits political activity by such persons in the classified service in connection with (1) an election and the campaign preceding such election if none of the candidates is to be elected at that election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected; or (2) a question which is not specifically identified with a national or state political party. For the purpose of this section, questions relating to constitutional amendments, referenda, approval of municipal ordinances, and others of a similar character, are deemed not specifically identified with a national or state political party. **Section 5-266c. Regulations.** The Commissioner of the Department of Administrative Services shall issue such regulations as are necessary and appropriate for administration of section 5-266a to 5-266d, inclusive. **Section 5-266d. Dismissal or suspension of employee. Appeal.** If, upon the complaint of any citizen of the state, the Commissioner of the Department of Administrative Services finds that any employee in the classified service has violated any provision of section 5-266a to 5-266d, inclusive, said commissioner may dismiss such employee from state service. If said commissioner finds that the violation does not warrant removal, he may impose a penalty on such employee of suspension from his position without pay for not less than thirty days (30) or more than six months. Any employee aggrieved by any action of the Commissioner under the provisions of this section may appeal as provided in Section 5-202.

**Sec. 5-267. Officers appointing authorities and employees to comply with law.** All officers, appointing authorities and other state employees shall conform to, comply with, and aid in carrying into effect the provisions of this chapter and the regulations issued hereunder. When any order is made under the provisions of this chapter or in accordance with the regulations hereunder, any officer or other person to whom such order is directed shall forthwith comply with the terms and provisions thereof.

**Sec. 5-268. Penalty.** Any person who, willfully or through culpable negligence, violates or who conspires to violate, any provision of this chapter shall be fined not more than one thousand dollars or imprisoned not more than one year or both. Prosecutions for violations of this chapter may be instituted by the state's attorney for the judicial district in which the offense is alleged to have been committed.

**The State Ethics Commission has established regulations defining conflicts of interests which can preclude persons in the classified service from holding elective office. These are as follows:**

#### **Definitions of Conflicts of Interest**

#### **Regulations of Conn. State Agencies Section 5-266a 1. Conflicts of Interests**

- (a) There is a conflict of interest which precludes a person in State service from holding or continuing to hold elective municipal office when one or more of the following applies:
  - (1) The Constitution or a provision of the General Statutes prohibits a classified state employee or a person employed in the Judicial Department from seeking or holding the municipal office.
  - (2) The classified State employee has an office or position which has discretionary power to:
    - (A) Remove the incumbent of the municipal office
    - (B) Approve the accounts or actions of the municipal office;
    - (C) Institute or recommend actions for penalties against the incumbent of the municipal office incident to the incumbents election or performance of the duties of said office;
    - (D) Regulate the emoluments of the municipal office;
    - (E) Affect any grants or subsidies. administered by the State, for which the municipality in which the municipal office would be held is eligible.

**PLEASE NOTE ALSO THAT PERSONNEL ENGAGED IN WORK SUBJECT TO THE PROVISIONS OF THE HATCH ACT ARE STILL COVERED BY THIS FEDERAL LAW.**

Individuals principally employed by a state or local executive agency (except for employees of higher education and research institutions) in connection with a program financed in whole or in part by federal funds or grants are covered by the act and may not: (1) be candidates for public office in a partisan election; (2) use official authority or influence for the purpose of interfering with or affecting the results of an election or nomination for office; and (3) directly or indirectly coerce contributions from subordinates in support of a political party or candidate. These employees, however, may: (1) be candidates for public office in a nonpartisan election; (2) campaign for and hold elective office in political clubs and organizations; (3) actively campaign for candidates for public office in partisan and nonpartisan elections; (4) contribute money to political organizations or attend political fund raising functions; and (5) participate in any activity not specifically prohibited by law or regulation.

**FOR AN INDEPTH DISCUSSION OF THE RELATIONSHIP BETWEEN THE HATCH ACT AND CONNECTICUT STATE LAW, PLEASE REFER TO THE ATTORNEY GENERAL'S MAY 30, 1995, MEMORANDUM TO AGENCY HEADS. PARTICULAR NOTE SHOULD BE MADE OF THE SECTIONS THAT ADDRESS THE SOLICITATION OF CONTRIBUTIONS FOR POLITICAL PURPOSES.**

With the exception of the Hatch Act, all of the statutory references quoted above are in the State Personnel Act. The sections are included in this General Letter for your information and guidance.

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Joseph G. Wankerl, Deputy Commissioner  
Bureau of Employee Relations

**MEMORANDUM**

TO: AGENCY HEADS

FROM: RICHARD BLUMENTHAL, ATTORNEY GENERAL

RE: POLITICAL ACTIVITIES OF STATE EMPLOYEES

DATE: MAY 30, 1995

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We understand that agencies may be in need of our advice on the application of the Federal Hatch Act (5 U.S.C. §§ 1501 - 1508) to state employees, and the consequences of violations of the Hatch Act on the state. This requires a discussion of the restrictions on political activities imposed by state and federal law.

Discussed below are the state and federal law provisions. In some areas federal law and state law contain identical provisions restricting certain activities, about which agency heads need to be sensitive. In other areas, the provisions of federal and state law differ. To the extent that federal law restricts political activity permitted under state law, the state may be subject to a loss of some federal funding.

Nonetheless, as we explain, if the political activity is permitted under state law there is no just cause under state law for disciplinary measures. It is important for state agencies to make every effort to avoid being placed in the difficult position of possibly losing federal funding as a result of the political activities of a state employee, while not being able to take action against the employee.

**I. POLITICAL ACTIVITIES UNDER STATE LAW.**

State law regulates political activities of state employees in Conn. Gen. Stat. §§ 5-268. These provisions apply to all employees.<sup>1</sup>

**A. Permitted Activities (Conn. Gen. Stat. § 5-266a(b),(c)).**

A person employed in the classified service or judicial department may vote as he chooses, express his opinion on political subjects and candidates, and participate actively in political subjects and candidates, and participate actively in political management and campaigns. This may include membership and holding office in a political party, campaigning for a candidate by making speeches, soliciting votes in support of or opposition to a candidate, and making contributions of time or money to a party or candidate. Under state law, an employee can even be a candidate for state or local office. An employee who is a candidate for state office or for full-time municipal office is required by virtue of Conn. Gen. Stat. § 5-266a(c) to notify his appointing authority within thirty days of nomination.

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**B. Prohibited Activities (Conn. Gen. Stat. §§ 5-266a(a), (b)).**

No person employed in the classified state service or in the judicial department may use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office or directly or indirectly coercing, commanding or advising a state or local officer or employee to contribute anything of value to a party or person for political purposes. Furthermore, no permitted activity may be done on state time or with state resources.

**Candidacy for Office and Holding Office**

As noted above, state employees may be candidates for state or local office. There are, however, some restrictions on holding office.

**1) Municipal Office**

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<sup>1</sup> The Term "state employee" as used in this memorandum only refers to classified or judicial department employees. It does not include unclassified employees.

A state employee may not hold municipal office where there is a conflict of interest. The State Ethics Commission has promulgated § 5-266a-1 of the state regulations defining conflicts of interest.

Conflicts of interest include situations where the agency in which the employee-municipal officer holder works has authority to remove the municipal officer holder from office, approve the accounts or actions of the municipal office, institute or recommend actions for penalties against the incumbent of the municipal office, regulate the emoluments of the municipal office, or affect state grants and subsidies for which the municipality is eligible. Also included are circumstances where state statute or local charter or ordinance prohibit the state employee from holding local office or where the state employee's job includes assisting himself as a municipal officer holder.

## **2) State Office.**

State employees are allowed to be candidates for state office. However, Conn. Gen. Stat. § 5-266a(c) requires that classified state employees or judicial department employees who accept an elective state office shall resign from their employment upon taking office. Furthermore, with respect to a state employee elected to the General Assembly, it is important to note that Conn. Const. Art. III, § 11 prohibits a legislator from holding an appointive position in the executive or judicial branches. Stolbera v. Caldwell, 175 Conn. 586, 402 A.2d 763 (1978), and App. dismissed, 454 U.S. 958 (1981).

### **D. Enforcement (Conn. Gen. Stat. §§ 5-266d, 268).**

A violation of state law provisions concerning political activity is just cause for discipline. Regulations of Connecticut State Agencies § 5-240-1a(14). Disciplinary action may be taken by an appointing authority. However, in this area, the Commissioner of the Department of Administrative Services is also authorized to directly take disciplinary action. Conn. Gen. Stat. § 5-266d; Regulations of Connecticut State Agencies § 5-240-5a(b). Disciplinary action may be in the form of a dismissal, or of a suspension of the employee for not less than thirty days or more than six months. Conn. Gen. Stat. § 5-266d.

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Any possible violations of state law regarding political activity should be reported to the Commissioner of the Department of Administrative Services. The Commissioner of the Department of Administrative Services will then investigate and take whatever action is appropriate.

Violations of state law regarding political activity may also lead to criminal sanctions under Conn. Gen. Stat. § 5-268. These sanctions may include a fine of up to \$1,000, imprisonment of up to one year, or both.

## **II. POLITICAL ACTIVITIES UNDER FEDERAL LAW.**

Federal law (commonly called the "Hatch Act") sets out regulations regarding political activities of state employees in 5 U.S.C. §§ 1501 – 1508 and 5 C.F.R. §§ 151.101 - 151.122. Federal law does not distinguish between classified employees and unclassified employees. However, not all employees are covered by federal law. Accordingly, it is important to identify who is covered and who is not.

### **A. Employees Covered (5 U.S.C. § 1501, 5 C.F.R. § 151.101).**

Generally, an individual employed by a state agency whose principal employment is in connection with an activity financed in whole or in part by federal funds is covered by the Hatch Act. This includes most elected officers and commissioners. Employees of educational and research institutions supported in whole or in part by the state are not included. Also, the Hatch Act does not include employees of the legislative or judicial branches. In determining which employees are included, an agency should anticipate that any employee who may perform duties in connection with an activity financed in whole or in part by federal loans or grants, as a normal and foreseeable incident to this principal position or job, is covered. This involves two steps of analysis. First, is the employee's employment with the state his principal employment? Second, does this employment involve, as a normal and foreseeable incident thereof, performance of some duties in connection with a federally financed activity? In Re Nello A. Tineri, 2 Pol. Act. Rptr. 825, 829 (1969).<sup>2</sup>

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<sup>2</sup> The Political Activity Reporter was a reporter published by the United States Civil Service Commission, predecessor to the Merit Systems Protection Board.

In determining whether the employee's employment is his principal employment, one looks at whether his principal employment is as a state employee, not at his duties. Normally, the principal employment of state employees is employment as state employees. However, if an employee has two jobs, there may be a question as to which job is the principal employment. Thus, an unpaid member of a housing authority who was also engaged in the private practice of law was not principally employed by the housing authority and, accordingly, not covered by the Hatch Act. Matturri v. United States Civil Service Commission, 130 F. Supp. 15 (D. N.J. 1955), aff'd 229 F.2d 435 (3d Cir. 1956) (per curiam).

Once it has been determined that a person's principal job is as a state employee, the nature of the employee's duties ought to be scrutinized. If it is a normal and foreseeable part of an employee's job to perform any duties in connection with a federally financed activity, the employee is covered by the Hatch Act. However, when the duties in connection with a federally financed

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activity are so small that they are insignificant the legal maxim de minimis non curat lex (the law is not concerned with trifles) comes into play. See Simmons v. Stanton, 502 F. Supp. 932, 937 (W.D.Mich. 1980).

We offer a word of caution on application of the de minimis maxim. It only comes into play when the employee's activities connected to federally financed activity are insignificantly small. An employee who devotes a small amount of time to federally financed activity is covered by the Hatch Act where it is a normal and foreseeable consequence of the employee's job to perform the duties connected to a federally financed program.

The following situations are examples of employees who would be covered by the Hatch Act:

1. A Department of Transportation engineer some of whose work is in connection with federally funded highway activity.
2. An Assistant Attorney General some of whose work is in connection with federally financed child support programs.
3. A secretary in the Department of Social Services, some of whose typing and filing duties are related to federally funded programs.
4. A maintenance worker in a federally financed maintenance program.

A case by case review is necessary since each situation may be different. However, where the work in connection with a federally financed activity is a normal and foreseeable activity of the employee, it is safe to assume that the employee is covered by the Hatch Act.

#### **B. Permitted Activities (5 C.F.R. § 151.11).**

State employees covered by the Hatch Act are permitted to engage in political activity to the widest extent consistent with the restrictions imposed by the Hatch Act. Permitted activity includes candidacy for political party office.

#### **C Prohibited Activities (5 U.S.C. § 1502; 5 C.F.R. §§ 151.121, 151.222).**

State officers and employees, including elected officers and commissioners, who are covered by the Hatch Act may not use their official authority or influence for the purpose of interfering with or affecting the result of an election or nomination for office, directly or indirectly coercing or advising a state or local employee to contribute anything of value to a political party or a person for a political purpose, or being a candidate for elective public office in a partisan election. The only exception is that the prohibition on candidacy does not apply to the Governor, Lieutenant Governor or the elected head of an executive department (in Connecticut these are the Secretary of the State, Treasurer, Comptroller, and Attorney General).

It is important to point out that it is only candidacy for office that is prohibited, not holding office. Thus, an individual who first enters state service while holding local office is not affected. However, running for election or reelection while a state employee would pose a problem.

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#### **D. Enforcement (5 U.S.C. §§ 1504-1508).**

The federal agency responsible for enforcing the Hatch Act is the Merit Systems Protection Board. Charges may be instituted by the Board's Special Counsel by providing notice to the employee involved and to the state.

After holding a hearing, at which both the employee and the state are entitled to be heard, the Board determines whether the Hatch Act was violated and whether the violation warrants removal from employment. The determinations are appealable to the United States District Court.

A determination that there is no violation or that a violation does not warrant removal ends the matter. However, a determination that there is a violation warranting removal may have consequences for the state. If the Board made a determination that a violation warranted removal and the employee was not removed within thirty days, or finds that the employee was removed and rehired within eighteen months, the state will lose federal funding equivalent to twice the annual salary of the employee.

State agencies should obviously avoid losing any federal funding. However, since the prohibitions under federal law are slightly different from the prohibitions under state law, state agencies must be particularly careful in taking action to avoid losing federal funds.

### **III. INTERACTION BETWEEN STATE LAW AND FEDERAL LAW.**

Much of what is prohibited by state law is also prohibited by federal law. Indeed, both state law and federal law prohibit using official authority for influencing elections and coercing state or local employees to pay or contribute anything of value for a political purpose. Violations of these provisions are just cause for discharge under state. Law. The Commissioner of the Department of Administrative Services will certainly investigate violations. If the Commissioner concludes that there was a violation, he will act accordingly. Violations that could lead to disciplinary action are described below.

State law and federal law do, however, differ on one point. State law permits candidacy for office while federal law prohibits candidacy. This conflict may have an effect on state agencies. This is also described below.

#### **A. Violations That Could Lead to Disciplinary Action.**

Several provisions of state law contain restrictions on certain political activity. Violation of any of these provisions would constitute just cause for discipline.

First and foremost, state law clearly prohibits any political activity on state time or with state resources. Conn. Gen. Stat. § 5-266a(b). Employees may not engage in such conduct at all. Agency heads should not tolerate any such activity.

In addition, two provisions of federal law and state law which restrict certain political activity are identical. These sections involve influencing the results of an election and coercing contributions for political purposes. Violations of either of these provisions could result in enforcement action

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under federal law and/or disciplinary action under state law.

A covered employee may not use the employee's official position to interfere with or affect the result of an election or nomination for office. 5 U.S.C. § 1502(a) (1); Conn. Gen. Stat. § 5-266a(a) (1) The meaning of these provisions is evident from the express terms of the statutes. They should certainly be heeded.

In addition, a covered employee may not coerce, attempt to coerce, command or advise a state or local employee to make contributions for political purposes. 5 U.S.C. § 1502(a) (2); Conn. Gen. Stat. § 5-266a (a) (2).<sup>3</sup> The statutes regulate the employee who solicits funds for political purposes. They do not regulate the employee who is making the contributions.

The determination of what conduct constitutes a violation of this restriction on solicitations is inherently fact based. In looking at the facts it is nevertheless important to recognize that where political contributions are concerned, "it is easy to see that what begins as a request may end as a demand..." Ex Parte Curtis, 106 U.S. 371, 1 S.Ct. 381, 384 (1882). The U.S. Merit Systems Protection Board, and its predecessor, the Civil Service Commission, have in

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<sup>3</sup> Nothing in these laws prohibits voluntary contributions by an employee, something which is expressly permitted by Conn. Gen. Stat. § 5-266a (b).

the past rendered a number of decisions finding that superiors soliciting political contributions from subordinates is inherently coercive.

Based upon our review of the caselaw, virtually all solicitation by a superior of a political contribution from a subordinate would be viewed as inherently coercive, and therefore barred. While there may be extremely limited circumstances where a factual defense could be articulated, such an approach is quite risky. Our advice to agency heads is that solicitation of a subordinate employee by a superior employee should not be allowed.

In the same vein, with respect to a solicitation of a state or local employee who is not a subordinate of the employee making the solicitation, our review of the relevant authorities indicates to us that it could be difficult to establish sufficient facts to justify solicitations of state or local employees in most situations. Accordingly, we suggest the prudent approach of classified state employees refraining from such solicitations. Should questions of political solicitations by classified employees of state or local employees arise, they should be addressed on a case by case basis to ascertain whether or not there was in fact a violation.

The above advice should not be read too broadly. Employees continue to have a right to make voluntary political contributions in whatever manner they may see fit. In addition, off-duty solicitation that does not involve state resources is permissible, so long that it does not involve solicitations of subordinates or other solicitations of state or local employees that would run afoul of the dictates of the law.

#### B. What Happens when Conduct Permitted By State Law Is Prohibited By Federal Law.

There is one important area where federal law and state law are different, namely the extent to which candidacy for office is restricted. In evaluating the interaction between federal law and

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state law in this area, it is important to understand that the federal law is directed to federal financing of state programs. Nothing in the federal regulatory program prevents the General Assembly from enacting legislation inconsistent with the federal requirements. The consequence

of such action could well be the loss of some federal funding. See Maher v. Freedom of Information Commission, 192 Conn. 310, 317 - 318, 472 A.2d 321 (1984); accord, Neustein v. Mitchell, 52 F. Supp. 531, 532 (S.D.N.Y. 1943) (state may retain employee if it wishes as only penalty is withholding federal funds).

Nevertheless, candidacy for elective office is expressly permitted by state law. Accordingly, there is no just cause for discharge, or any other discipline, under state law.

The Office of the Attorney General has previously litigated with the federal government a constitutional challenge to the Hatch Act, in which we claimed that the Hatch Act as applied to two Connecticut employees, among other things, violated constitution rights of political association. The lower federal courts decided against us, feeling that they were not free to depart from previous decisions of the U.S. Supreme Court, and the Supreme Court declined to review the case. State of Conn., DHR v. U.S. M.S.P.B., 718 F.Supp. 125 (D. Conn. 1989), aff'd mem., 896 F.2d 543 (2d Cir. 1990), cert. denied, 498 U.S. 810, 111 S.Ct. 43 (1990). This litigation only involved constitutional issues and not the question of the application of the state statutory right to be a candidate. Indeed, the Merit Systems Protection Board acknowledges that the choice of whether to discharge an employee who was found to have engaged in political activity which "warrants removal" under the Hatch Act, or suffer the withholding of certain federal funds, is one that belongs to the state. Special Counsel v. Camillieri, 33 M.S.P.R. 565, 567 n.5 D (U.S. M.S.P.B. 1987); Special Counsel v. Winkleman, 36 M.S.P.R. 71, 74 n.3 (U.S. M.S.P.B. 1988). It is clear that Connecticut has made its choice through the statute expressly permitting candidacy.

Agency heads should be very conscious of this situation and make every effort, within the guidelines we provide below, to make work assignments that will avoid the loss of funding. We should note that heads of agencies that receive no federal funding should also be conscious of work assignments since employees of their agencies may perform some functions in connection with another state agency and possibly jeopardize some of the other agency's funding.

#### 1) Planning to Avoid Future Loss of Funding.

While it may be too late to avoid funding problems resulting from an employee who was a candidate in the past, it is not too late to plan to avoid problems with future candidates. This could be done by transferring an employee to an area that performs no work at all in connection with a federally funded activity. A transfer does not cure a past violation. It merely helps avoid the possibility of a future violation.

Any transfer to avoid Hatch Act penalties must be permanent, it cannot be limited to the time that the employee is a

candidate. Also, a transfer must otherwise conform with state law.

With respect to employees who are covered by collective bargaining agreements, transfers must comply with the terms of the collective bargaining agreement. It is best if the transfer is voluntary. An agency head may consider an involuntary transfer only if the collective bargaining agreement permits involuntary transfers for non-disciplinary purposes.

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With respect to employees not covered by collective bargaining agreements, § 5-239-l(a) of the state personnel regulations permits transfers to be made by an agency head for the good of state service. While here too, a voluntary transfer is best, the agency head may make an involuntary transfer to a position in the same salary range and with the same requirements as to knowledge, skill, ability, experience and training.

A transfer may not be made under these circumstances to a non-comparable or lower position. That would be a demotion. Just as being a candidate for office is not just cause for discharge, under state law, it is also not just cause for demotion.<sup>4</sup>

### **2) Circumstances Not Warranting Loss of Funding.**

Agencies only lose funding in those circumstances where the Merit Systems Protection Board finds a violation of the Hatch Act and that the violation warrants removal. As a practical matter, agency heads should assume that all violations will fit in this category and plan accordingly.

There is, however, a very narrow class of cases where the Merit Systems Protection Board may find that a violation does not warrant removal. We will describe this class of cases very briefly.

In determining whether removal is warranted, two things are examined. An inquiry is made as to an employee's knowledge that the Hatch Act applied to him and as to whether or not the prohibited activity was of a substantial nature.

Simply not knowing that the Hatch Act applied does not excuse a violation. But there is a serious question about the appropriateness of the penalty of removal where an employee had no actual knowledge of the Hatch Act's application to him or was employed under circumstances that did not place on him a burden to inquire further. Employees who knew of the Hatch Act or who knew that there might be some prohibition on political activity had a duty to inquire as to whether the Hatch Act applied to them. In Re Stanley J. Brown, 3 Pol. Act. Rptr. 273, 312 (1974). Thus, if an employee made reasonable inquiry and was erroneously informed that the Hatch Act did not apply, the employee's activities did not warrant removal. In Re Hello A. Tineri, 2 Pol. Act. Rptr. 825, 833 (1969).

Under an earlier and significantly broader version of the Hatch Act, the federal government would evaluate the nature and seriousness of the political activity including activity that did not amount to candidacy. While circulating a single nominating petition to 25 persons might not warrant removal, circulating a nominating petition requiring more than 25 signatures would warrant removal. In Re Stanley J. Brown, 3 Poll Act. Rptr. 273, 315 (1974). Historically, the Board has considered even political activity less than candidacy as justifying removal. In the two cases that we have litigated recently, the Board concluded that candidacy for office was a serious enough violation to warrant removal. Special Counsel v. Camillieri, 33 M.S.P.R. 565 (U.S. M.S.P.B. 1987); Special Counsel v. Winkleman, 36 M.S.P.R. 71, 74 (U.S. M.S.P.B. 1988). We expect the Board to continue this practice.

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If agency heads transfer employees to avoid Hatch Act problems, as we suggest above, the agency heads should avoid the possibility of future violations with a resulting loss of funds. However, if there is a situation that falls between the cracks and it turns out that the employee was unaware of the application of the Hatch Act, the state may have some protection against the loss of funds.

### **CONCLUSION .**

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<sup>4</sup> We also note that candidacy for or holding office should not be a factor in hiring or promotional decisions, unless state statutes specifically provide otherwise. At the present time, these circumstances would only be holding positions in more than one branch of state government or holding municipal office where there is a conflict of interest.

There are both state and federal laws regarding political activity of state employees. These laws are of direct concern to individual employees and to agency heads.

Individual employees and agency heads should be on notice that violations of state law regarding political activity are serious matters. These include engaging in any political activity on state time or with state resources, using official influence to affect the results of an election, or coercing, attempting to coerce, commanding or advising state or local officers or employees to make contributions for partisan purposes, as described in the body of this memorandum. Such violations are just cause for discipline.

Also, violations of the federal law may affect federal funding to the extent that the violation under federal law is an activity permitted under state law. Agency heads should take steps, as we have suggested, to avoid loss of federal funding. These steps must be consistent with the rights of state employees under state law. The Office of the Attorney General and the Department of Administrative Services, HR Business Center stand ready to assist agency heads with questions that may arise regarding the Hatch Act.